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Supreme Court, U.S.
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NO. 87-1855
NO. 87-7147

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL, PETITIONER
V.
RUSSELL A. MUTH, JR., ET AL,
RESPONDENT
AND
RUSSELL A. MUTH, JR., PETITIONER
V.
THOMAS K. GILHOOL, ET AL.,
RESPONDENT

BRIEF OF RESPONDENTS CENTAL BUCKS SCHOOL DISTRICT AND DR. THOMAS L. NEWMAN IN RESPONSE TO PETITIONS FOR CERTIORARI OF THOMAS K. GILHOOL AND RUSSELL A. MUTH, JR.

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SUMMARY OF ARGUMENT

Respondents, Central Bucks School District and Dr. Thomas L. Newman have no opposition to the granting of Certiorari on the issues raised in the Petition of Thomas K. Gilhool, No. 87-01855.

The Petition for Writ of Certiorari filed by petitioner Russell A. Muth, Jr. contains issues not properly before this Court because not previously raised by petitioner. Since the issues raised by petitioner-Muth are of a factual or evidentiary nature, this Court's jurisdiction is inappropriate. Petitioner-Muth has made no showing that any of the considerations governing review on certiorari pursuant to Supreme Court Rule 17 is applicable to the within case.

ARGUMENT

I. Respondents Central Bucks School District and Dr. Thomas L. Newman do not oppose the Petition for Writ of Certiorari filed by Thomas K. Gilhool

II. THE PETITION OF RUSSELL A. MUTH, JR. SHOULD BE DENIED

A. PETITIONER-MUTH IS PRECLUDED FROM RAISING CLAIMS NOT PROPERLY PRESERVED AT TRIAL OR ON APPEAL.

Petitioner seeks review by this Honorable Court of twelve "questions". However, with the exception of the issues raised by questions six, nine, ten and eleven, petitioner has failed to properly preserve the remaining issues.[1] At no time during the trial of the case before the District Court did petitioner claim that Pennsylvania imposed a higher substantive standard for the quality of the educational program

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[1]For purposes of this petition, respondent has concluded that issues six, nine, ten and eleven of the petition relate to the issue of whether the program and placement proposed by respondent for the minor child were appropriate.

than the "appropriateness" standard articulated in Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3050, 73 L.Ed 2d 690 (1982). At the time of trial, petitioner was represented by counsel. On appeal to the Third Circuit, petitioner raised this issue for the first time and the Third Circuit held that the issue had not been properly preserved, Muth v. Central Bucks School District, 839 F.2d 113 at 120 (3d Cir. 1988).[2] On certiorari, this Court may not address the Pennsylvania standard for the quality of the educational program because petitioner failed to properly preserve the issue.

Muth's alleged privacy violations set forth in questions three, four, and five are

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[2]The Third Circuit stated "In this appeal, Muth raises for the first time the claim that Pennsylvania law goes beyond the federal minimum to set a higher substantive standard for the quality of the program which must be available to handicapped children. Appellant's Brief at 15. Because Muth did not make this argument before the district court, we decline to express an opinion on it", 839 F.2d at 120 FN 13.

not reviewable by this Court because not raised at trial before the District Court. Again, at trial, Muth was represented by counsel and made no objection to the use of evidence of a medical, psychological or psychiatric nature. Any objection was therefore waived by Muth.

Moreover, the allegations propounded in questions seven and eight were never raised before the Third Circuit on appeal and have been waived.

Finally, the issue of Dr. Thomas Newman's liability was specifically found by the Third Circuit to have been waived by Muth's failure to raise the issue on appeal.[3]

Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850,

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[3]The Third Circuit stated, "Dr. Newman, the Superintendent of the Central Bucks School District was initially named by Muth as a defendant as well. However, the suit against Newman was dismissed on the ground that Newman was entitled to immunity under the standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982) (official is immune if did not violate statutory or constitutional rights of which a reasonable person would have known). This dismissal is not challenged on appeal, 839 F.2d at p. 116 FN 2.

99 L.Ed 1231, rehearing denied, 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed 759 (1955).

B. PETITIONER-MUTH'S CLAIMS DO NOT WARRANT REVIEW BY THIS COURT.

Rule 17 of the Supreme Court Rules, 28 U.S.C.A., lists the considerations governing review on certiorari. None of the factors judged important under Rule 17 are present in the petition of Muth. Indeed, the questions presented by Muth, other than those discussed previously, involve questions of fact peculiar to this case only and have no impact on or conflict with any other federal or state court. Review of findings of fact is limited and the factual determinations may be overturned only if there has been clear error, Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3rd Cir. 1986), cert. denied 107 S. Ct. 99 (1986). This Court has previously delineated the standard under which a program of education must be scrutinized and the Third Circuit's analysis of the educational

program was in accordance with well-settled decisions of this Court, Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3050, 73 L.Ed. 2d 690 (1982).

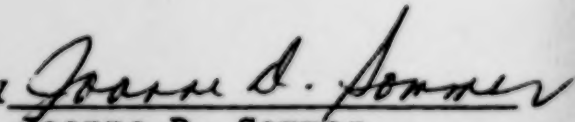
Petitioner-Muth has recited no compelling reasons why this Court should scrutinize the decision of the Third Circuit of Appeals and the petition should be denied.

CONCLUSION

The Petition of Russell A. Muth, Jr. should be denied for failing to properly preserve issues for appeal and for failing to demonstrate significant or important reasons for the exercise of this Court's jurisdiction.

Respectfully submitted,

EASTBURN AND GRAY

BY 

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